DECEMBER 2. 1766.

ANSWERS

FOR

JOHN CAMPBELL in *Cattleton*;

TO THE

PETITION of *Andrew Crawfurd* Drover in *Gairloch-head*.

THE reſpondent is a conſiderable dealer in cattle, and has generally a pretty good ſtock of his own breeding. Such as are of his own ſtock, he is invariably in uſe to mark with a *Heart* and an *O*, upon the far, or right horn; and when ſo marked, is in uſe to ſell them in droves at the ſeveral publick markets in this kingdom, particularly ſuch as fall under the deſcription of ſtots, which are generally ſold in large numbers and not ſingly. In the courſe of this trade, the reſpondent, at *Michaelmas* 1761, ſent a drove of five ſcore of ſtots to the *Falkirk market*, under the care of three or four perſons, three of whom have been examined in this cauſe.

Sometime after the ſtots had been brought to the market, one of them ſtrayed from the reſt, and went into an adjoining drove belonging to the petitioner; and tho' a ſearch

ſearch was made for it through the reſt of the market, the ſtot could not be found, having been, probably, carried off, before the ſearch, by the petitioner, who, as appears from the proof, is a gentleman very well diſpoſed to give a hoſpitable reception to ſtrayed cattle, *vide William Ewing*, page 11. E, F, G. The reſpondent was therefore obliged to diſpoſe of ninety nine of his ſaid ſtots, to *William* and *John Ewings*, likewiſe dealers in cattle, under this proviſo, that the remaining ſtot, when found, ſhould be delivered to them, and that he ſhould be obliged to receive it at the ſame price with the reſt.

In *November* 1763, the reſpondent learned that his ſtot had been ſold by the petitioner to *Thomas Philips* fleſher in *Dumbarton*, and that it was graſing with other cattle which had been likewiſe ſold by the petitioner to Mr. *Philips*, in the parks of *Levenſide*.

Upon the 7th of that month, the reſpondent went to ſaid parks, and after viewing the cattle therein, ſingled out a brown coloured ſtot, which he challenged as his property, and as having ſtrayed from him at *Falkirk* market, as above ſet forth; and, in confirmation of ſaid challenge, having found his mark upon the far horn of ſaid ſtot, he, in preſence of witneſſes, applied his burning iron to ſaid mark, which all of them obſerved, and have now depoſed, exactly fitted it.

Upon this diſcovery, and a clear conviction of the identity of the ſtot, which being of his own ſtock, he could the better judge of, the reſpondent applied to the petitioner for reſtitution of it. A ſubmiſſion was propoſed, and the reſpondent, who was very deſirous to avoid a law ſuit upon ſo ſmall a ſubject, agreed to it.

Oct. 14. 1764. In this ſhape the matter lay over till the ſaid ſubmiſſion expired, and one of the reſpondent's moſt material witneſſes died; and it was probably owing to this circumſtance, that

that the petitioner did not incline to renew it, tho' the arbiters were men of undoubted character and integrity.

The reſpondent being unable to obtain redreſs in an amicable way, was obliged to bring an action before the ſheriff of *Dumbarton*, ſetting forth the above facts, and concluding, that the petitioner (therein called the defender) ſhould be found liable to him, either to deliver ſaid ſtot, or to pay the value thereof, being ſeven pounds, with five pounds *ſterling* as the expence of plea, and ſuch further ſums as ſhould be incurred by ſaid defender's litigiouſneſs. Ap. 176.

In this ſuit the petitioner reſted his defences upon the following facts, which are indeed fairly recited in the petition: That the ſtots ſold to *Thomas Philips*, came from the *Highlands*, and *were picked out of a very large drove*, collected from different corners; ſo that it need not be any ſurpriſe tho' *Cattleton*'s (the reſpondent's) mark, ſhould appear on ſome of them, as that gentleman dealt at a very extenſive rate, and his cattle, after ſales, being ſcattered up and down through ſecond and third hands, to numbers of people, it was impoſſible to notice the different marks when collecting a drove to go to market; at leaſt, (it was added) the defender *had of late, and ſtill has cattle of different kinds with this purſuer's mark*; ſo that the queſtion with reſpect to the preſent ſtot, might, after ſuch elapſe of time, occaſion as relevant a proceſs in other corners as in this.

The defender then proceeds to ſome argument upon theſe facts, in his own favours, unneceſſary here to be noticed: It is however proper to point out the view with which theſe facts ſeem to have been advanced. There was no denying that the brown ſtot had the reſpondent's mark upon it, and that it was the only one, of a great quantity ſold to *Philips*, that had this mark; it was therefore neceſſary ſomehow to account for this ſingle ſtot making his appearance ſo ſuſpiciouſly in that drove: And the defender, to take off the weight of that juſt ſuſpicion, thought proper to aver the

the fact, that this drove ſold to *Philips*, had been picked out of a larger one, collected from all the different corners in the *Highlands;* as it was only in the way of *picking out* that this ſingle ſtot, evidently the property of a large dealer in cattle, could be ſuppoſed to have come into the defender's hands. The defender did not think proper, however, to prove this fact, that would have been attended with more difficulty. And your Lordſhips will further obſerve, that in another inſinuation, the impoſſibility of noticing different marks, and the confuſion attending their paſſing through different hands, it is altogether an affected tale to diſguiſe the real truth; for it is now eſtabliſhed in proof, that dealers in cattle are very exact in putting on their own marks, or effacing thoſe of others. And as to the third alledgeance, that the defender had ſeveral cattle with the purſuer's mark, evidently intended to account for this ſingle ſtot's having it: The defender has found it neceſſary to leave this alſo deſtitute of proof.

It would indeed appear from the procedure before the ſheriff, that in the courſe of that proceſs he truſted more to the effects of obſtinate litigation, and the difficulty of detecting him, than to the truth of his averments.

For the court will be informed, that he carried the matter ſo far, as to inſiſt for the purſuer's oath of calumny; upon which the reſpondent ſwore, that he had juſt and good reaſon and cauſe to inſiſt in ſaid proceſs.

June 5. 1766. Extract, p. 5.

In a queſtion of this kind, where the proof was evidently difficult, relating to the identity of an animal at the diſtance of ſome years, and where the reſpondent was the perſon who could beſt know that fact; this was truly a ſort of reference as to his knowledge of it; and at a time when oaths of calumny are ſo unuſual in practice, it is hoped this oath of a man of character, tho' a party, will have its due weight in the ſcale of evidence.

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The reſpondent muſt further take notice with regard to this proceſs before the ſheriff, that the defender inſiſted upon the moſt obſtinate and trivial objections againſt the witneſſes; ſome of them had been brought from *Argyle* ſhire, by letters of ſupplement, and by that circumſtance were not known to the reſpondent's procurator. This produced an objection, that the defender had not been ſerved with a liſt, and procured the delay of the examination for a day.

Againſt *William Ewing* he gave in an objection, contained in page 8th of the extract, which it is difficult to make ſenſe of, and of which he has not brought the leaſt proof: But at that time he carried it ſo far, as to appeal to the ſheriff-depute for a deciſion; and againſt all the reſt, he proteſted for action of reprobator, though he had nothing particular to ſay to them.

It is only proper further to obſerve, that the reſpondent required ſaid defender ſhould be ordained to confeſs or deny the following facts; " Whether or not he was at the " *Michaelmas* market at *Falkirk* in the year 1761, and had " there a drove of black cattle, or ſtots, ſtanding nigh a " drove belonging to the purſuer? Whether or not he " knows the purſuer's ordinary mark? and, in the *laſt* " place, from whom he bought the drove of cattle he the " defender then had, and if he knows any thing with re- " ſpect to the ſtrayed ſtot mentioned in the preſent proſe- " cution?"

The ſheriff ſuperſeded the defender's declaration, till the end of the reſpondent's proof; and when ſaid defender comes to declare, tho' he is expreſly required to condeſcend from whom he bought the drove of cattle he had at *Falkirk*, he is altogether ſilent upon that head; and as to the ſtot in queſtion, is utterly at a loſs for an author to it: His declaration is in theſe words; " Declares, That he was " at the *Michaelmas* market in the year 1761: That he had

" at that market a drove of ſtots, which he ſold to two
" *Engliſhmen* of the name of *Ladlie* and *Park*, as he thinks.
" Declares, That *Duncan Macgregor* at the head of *Glen-*
" *froon*, had the care of his cattle at this market: Declares,
" That *he does not remember from whom he purchaſed the ſtot*
" *in diſpute.*"

The reſpondent has been more minute, with regard to the defender's conduct in this proceſs, than was perhaps neceſſary; but he apprehends, that if any obſcurity ſhould appear in the evidence, it ought to have ſome weight, that the defender did all in his power to prevent any being brought at all; and if he averred facts which he alone could clear up, and has now left them deſtitute of proof, a natural preſumption muſt ariſe, that either theſe facts were falſe, and of courſe advanced to ſupport a falſhood, or, if enquired into, would have turned out againſt him: And in the ſame point of view, it is proper further to inform the court, as it is owned in anſwers to the bill of advocation, that *Thomas Philips*, to whom the petitioner had ſold this ſtot, was ſo conſcious that the reſpondent's plea was juſt, that he brought an action againſt the petitioner, for repetition of the price of the ſtot in queſtion; in which proceſs the ſheriff gave judgment, finding the petitioner liable in reſtitution, in caſe of ſaid ſtot's being evicted. This is demonſtration of *Philip*'s idea of the matter, and at ſame time gives no very favourable impreſſion of the defender.

But the reſpondent apprehends, that he has no occaſion to reſort to theſe extraneous arguments; he has brought as clear and convincing a proof as the nature of the thing is capable of; and the very defects of it, if there are any, plainly demonſtrate the candor and veracity with which it has been conducted. He has clearly proved, that a ſtot at *Falkirk* market ſtrayed from his drove, and it is evident from all the depoſitions, that this happened after the ſtots

came

came to the market; ſo that the petitioner's alledgeance of its being loſt upon the road, will not avail him. *Archibald Campbell*, one of thoſe who attended the drove to ſaid market, depones, page 12th, D. " That at the mar-" ket, there ſtrayed from the purſuer's ſtots a ſtot; but of " what mark or colour, the deponent cannot ſay. *Dougal Campbell*, p. 12. G. depones, " That at the *Michaelmas* " market 1761, held at *Falkirk*, this deponent was employ-" ed to aſſiſt in driving fiveſcore of ſtots to the ſaid mar-" ket, belonging to the purſuer, which he did: That one " of the ſaid ſtots was amiſſing, or loſt *at the ſaid market*, " but of what colour the deponent cannot ſay; and that " the mark uſually uſed by the purſuer on his cattle, is a " *heart* and an *O* upon the far horn; but cannot ſay whe-" ther theſe fiveſcore of ſtots had the ſame mark or not, " tho' they *ought* to have had it, as the purſuer puts his " mark upon the far, or right horn of the cattle belong-" ing to him. Knows that the purſuer ſold his cattle to " one *William Ewing* and his brother, near the water of " *Leven*. That one of the number, before the ſale to " Meſſrs. *Ewings*, was amiſſing. Depones, That the ſtots " was immediately delivered to Meſſrs. *Ewings* after the " ſale; but, upon recollection, is not poſitive whether it " was upon the day of the ſale or not."

It is true, none of theſe witneſes preſume to ſay, that the individual ſtot which ſtrayed had this mark, but how could they, unleſs they had looked at the far horn of every ſtot in the drove? they were very well able to aſcertain whether a ſtot had ſtrayed upon the road, or at the market, but it was impoſſible for them to do the other: what they depoſe to, however, ſufficiently clears up the matter, as both of them fix the purſuer's mark, and very properly add, that theſe ſtots ought to have had it, which is ſufficiently cleared by what *William Ewing* depones, " That *all* the cattle the p. 10. " deponent received from the purſuer, as his own ſtock, had

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" the ſaid mark." And *John Robertſon*, who herded theſe very
p. 9. A, B. cattle, fixes this mark upon them beyond the poſſibility of doubt, in theſe words: " That he has been for *ſome time well* " *acquainted* with the purſuer's mark, which he uſed to put on " his cattle, as he the deponent herded five ſcore of them, a- " bout four or five years ago in the parks of *Auchinreoch*. " That the ſaid mark put upon the purſuer's cattle is a " *heart* and *O*."

The reſpondents challenging the ſtot in queſtion as his, as well as the exactneſs with which his ſtamp fitted the impreſſion it formerly made, is proved beyond the poſſibility of cavil; and the purſuer himſelf, when called on by the defender, has given evidence in his oath of calumny, that he believed ſaid ſtot to be his; for ſuch is the import of his oath: And beſides all this, *John Robertſon* the reſpondent's
p. 9. B. herd, the only other perſon in life, who could have a very intimate knowledge of this drove, depones, " That he *knows* " the brown ſtot, which has been in queſtion formerly be- " fore this court, and is now in the hands of *John Rough* " tenant in *Garſhake*." A herd who tends cattle for a conſiderable time, and who has no other ideas but what relates to them, may know one of a ſtock which he has tended, and the witneſs has ſaid ſo; ſo that it is difficult to conceive, what more direct evidence there could have been brought of this fact.

The very exiſtence of the mark upon this animal, ought to be ſufficient to aſcertain the property when joined to the practice of dealers, as proved in this caſe, that they are in uſe, upon a purchaſe, to put on their own mark, either upon the old one, when effaced, or by adding it thereto. Moſt interpreters, in queſtions of property, have received the
L. 14. § 1. ff. de peric et commod. rei vend. maxim, " *cujus et ſignum ejus eſt et ſignatum*;" and very properly found their doctrine upon the texts in the *Roman* law: But there is a great deal more in this caſe, the actual loſs is proved to conviction; which intirely deſtroys the general exception,

ception, that the ſubject marked might have been diſpoſed of by the owner; which, at beſt, your Lordſhips will obſerve, is but a *poſſibility*, oppoſed to a contrary proof: And, in the preſent caſe, it is rendered highly improbable, if not clearly demonſtrated to be falſe, by the petitioner's own conduct; for, if he purchaſed this ſtot, what hinders him to prove it? Why has he not eſtabliſhed, as averred in his defences, that this ſingle and ſuſpicious ſtot, was one of thoſe *picked* out of a large herd? Such fact, if true, could have been eaſily proved. Nay, why does it want his mark? He owns he is a dealer in cattle, ought he not to comply with the rules of the trade? And, if he had fairly purchaſed this ſtot, what was the neceſſity of his advancing, that he had bought many others of the purſuer's cattle, which he has likewiſe failed to prove?

In ſhort, the whole circumſtances of the caſe demonſtrate, that this ſtot had ſtrayed into his drove at *Falkirk* market; and he has not ſo much as attempted to prove the exception which he made to this, that he had ſold the whole cattle he had at the market to two *Engliſhmen*, whoſe names, notwithſtanding that great purchaſe, he can ſcarce recollect.

The petitioner is indeed pleaſed to ſay, that his mark not being upon it, is a proof that he had come lawfully by ſaid ſtot; becauſe, if he had come unlawfully by it, he would have compleated this unlawful act by putting on his mark. But will it be maintained, that every perſon who commits a fraud, is cautious enough to do every thing to prevent a diſcovery? Want of precaution is luckily often the companion of guilt; and, in this particular caſe perhaps, it would be ſafer to leave the ſtot without a mark, as the aſſiſtance of his ſervants, if uſed, might have led to a diſcovery. But as, indeed, the putting on his mark would not have been concluſive of his having come lawfully by this ſtot, far leſs ought the want of it be ſuſtained as an argument of pro-

perty. The ſtrong and ſtriking fact againſt him is, that after the property of this ſtot has been ſo clearly proved to be in the reſpondent, he has not been able to account how he came by this ſingle ſtot, which is proved to be the only one ſo marked in a whole drove: Thus *William Ewing* " Depones, " Knows, as he was told by *Thomas Philips*, that he had " purchaſed a quantity of ſtots from the defender, whereof " the ſtot before mentioned made one; and which ſtots " came to be grazed in the parks of *Auchinreoch*: And the " deponent did not obſerve any of the reſt of the ſtots, ex- " cept the one above mentioned, have the mark above de- " ſcribed; *and had occaſion to ſee the ſame very often.*"

P. 11. C, D, E.

What follows in this depoſition, contains an anecdote concerning the defender, not unworthy of notice; as it ſhews he has been in uſe to receive ſtrayed cattle. And, " Upon interrogatory of the defender, depones, That he " knows, that about three years ago, there were three ſtots " ſtrayed from the deponent and his brother, which, after " ſearch, was found about the *Gairlochhead*; but whether " they were their property, or ſome of thoſe taken in be- " longing to other people for wintering, or of what colour " they were, the deponent does not know; and which three " ſtots were brought back to the parks of *Auchinreoch*, as the " deponent was told by his brother.'

And it is remarkable, that the defender ſeems to have been ſo conſcious of this coming out againſt him, that he ſtrove, *totis viribus*, to ſuppreſs this evidence, by objecting to the witneſs, that he had formerly got a ſtrayed ſtot from him, which might be the ſtot in queſtion; thereby meaning to infer a ſort of intereſt in the cauſe; a fact which he has not pretended to prove, though he proteſted for action of reprobator.

As the reſpondent therefore, makes no doubt, that, upon the whole circumſtance of the caſe, your Lordſhips will be convinced, that the ſtot in queſtion is his property, and that this

this was known to the defender, he plainly falls within the predicament of one *qui dolo poſſidere deſiit;* and, in this view, the action is as unqueſtionably competent againſt him. It is, therefore, almoſt unnneceſſary to mention, that this objection was not ſtated before the ſheriff, which, therefore, if competent, muſt be conſidered as omitted. Nor is it neceſſary to enter into the ſubtility of the *Roman* law, the writers on which conſider, *liti ſe offerentes*, as poſſeſſors in this action; particularly when they do not name their author, which is the caſe. In this caſe, it was a matter of indifference to the reſpondent, whether *Philpis* or he had been ſued; as the ſheriff had, in a queſtion betwixt them, found, that if the ſtot was evicted, the petitioner ſhould be obliged to reſtore the price. And it ſurely would not have been ſo juſt to have given him additional trouble, as *Philips* had done what every honeſt man ought to do, and can with eaſe do, *viz.* had condeſcended upon his author.

Heineccius, lib. 6. ad Pand. tit. 1. §. 87.

The reſpondent apprehends, that the petitioner's other argument in law, is equally ill-founded; for the act 1663, concerning advocations, as well as the 20th of *George* II. applies only to ſuits for ſums of money; whereas here, the purſuit was concerning a *corpus*: And, even in the other view, the purſuer had ſuffered much more damage by the defender's delays and litigioſity, than would make up the legal ſum. But beſides, the Lord Ordinary has not, in any ſhape, tranſgreſſed theſe ſtatutes; for he has not advocated the cauſe, but remitted the ſame to the ſheriff; and it is clear, that a reduction was not neceſſary to obtain redreſs, as the defender had not extracted his decreet.

Upon the whole, the reſpondent makes no doubt, but your Lordſhips will adhere to the Lord Ordinary's interlocutor.

In reſpect whereof, &c.

ILAY CAMPBELL.